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In the Supreme Court of the United States

OCTOBER TERM, 1959

MAURICE A. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and rules involved	2
Statement	5
Argument	8
Conclusion	13

CITATIONS

Cases:

Burris v. *United States*, 192 F. 2d 253	10
Dictograph Products Co. v. *Sonotone Corp.*, 230 F. 2d 131	11
Gouled v. *United States*, 255 U. S. 298	10
Hanson v. *United States*, 186 F. 2d 61	9
Montgomery v. *United States*, 203 F. 2d 887	9
Powers v. *United States*, 223 U. S. 303	9
Sclafani v. *United States*, 265 F. 2d 408, certiorari denied, 360 U. S. 918	8-9
Smith v. *United States*, 348 U.S. 147	10
Steele v. *United States*, 267 U. S. 505	10
TCF Film Corp. v. *Gourley*, 240 F.2d 711	10
Turner v. *United States*, 222 F. 2d 926, certiorari denied, 350 U. S. 831	9
United States v. *Frank*, 245 F. 2d 284	9
United States v. *Janitz*, 161 F. 2d 19	12
United States v. *Pack*, 247 F. 2d 168	12
United States v. *Sheba Bracelets*, 248 F. 2d 134	9
United States v. *U. S. Smelting Co.*, 339 U. S. 186	11
Vloutis v. *United States*, 219 F. 2d 782	9
Wilson v. *United States*, 162 U. S. 613	9
Wisniewski v. *United States*, 353 U. S. 901	11

Statute: Page

18 U.S.C. 3731 ..... 3, 12

Miscellaneous:

Federal Rules of Criminal Procedure:

Rule 12(b)(2) 3, 12

Rule 41(e) 4, 9, 10

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OPINIONS BELOW

The opinions of the District Court relating to petitioner's pre-trial motion to suppress evidence and to dismiss the indictment (Pet. 33-45) are not reported. The opinion of the Court of Appeals vacating the pre-trial order suppressing evidence and dismissing the indictment (Pet. 46-54) is reported at 256 F. 2d 745, certiorari denied, 358 U. S. 873. The opinion of the District Court denying petitioner's motion for a new trial (Pet. 55-64) is reported at 172 F. Supp. 278. The opinion of the Court of Appeals affirming

the judgment of conviction (Pet. 65-70) is reported at 275 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1960 (Pet. 71) and on March 30, 1960, Mr. Justice Brennan granted a 30-day extension of time to May 1, 1960, for filing a petition for a writ of certiorari. The petition was filed on Monday, May 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's books and records, which he voluntarily submitted to a Treasury agent at the beginning of the investigation, should have been suppressed because that agent did not advise him at the outset that he might be prosecuted criminally, even though petitioner later—after having been so warned—turned additional books and records over to another agent.

2. Whether the question of the admissibility of petitioner's books and records, which had been thoroughly litigated in two pre-trial hearings and a pre-trial appeal, should have been reopened at trial in order that the jury might pass upon it, where there was no conflicting evidence at the pre-trial hearings and no new evidence was adduced at trial.

3. Whether, in the circumstances of this case, the court below correctly applied the intra-circuit rule that judges of coordinate jurisdiction sitting in the same court may not overrule each other's decisions.

4. Whether the court below lacked jurisdiction when, in 1958, it vacated district court orders dismissing the indictment (under Rule 12(b)(2), Federal Rules of Criminal Procedure) and suppressing evidence.

STATUTE AND RULES INVOLVED

18 U.S.C.:

> SEC. 3731 [as amended by Sec. 58, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Appeal by United States*
>
> * * * *
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * *

Federal Rules of Criminal Procedure:

> Rule 12. *Pleadings and Motions before Trial; Defenses and Objections*
>
> * * * *
>
> (b) *The Motion Raising Defenses and Objections.*
>
> * * * *
>
> (2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction

in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * *

Rule 41. *Search and Seizure*

* * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless op-

portunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * *

STATEMENT

On September 9, 1954, petitioner was indicted in the United States District Court for the West District of Pennsylvania for willfully attempting to evade and defeat his individual income tax for 1950. (R. 1a, 9a.)[1] After pleading not guilty, petitioner, on October 18, 1954, moved to suppress certain evidence and to dismiss the indictment. (R. 2a.) The motion to dismiss alleged, *inter alia*, that the indictment had been procured "under circumstances constituting self-incrimination and in violation of defendant's constitutional rights." (Pet. 45.) District Judge John L. Miller granted a full hearing on the motion to suppress, at which several witnesses testified. (R. 2a, 1b-31b.) The testimony disclosed that petitioner, an attorney, had been suspected of involvement in the misfeasance of certain Internal Revenue Service employees. As a consequence, his records were examined by an agent of the Service for a dual purpose: to ascertain whether petitioner was involved in the suspected wrongdoing and to determine whether

[1] "R." designates the record filed by petitioner with his first petition for certiorari, *Wheeler* v. *United States*, No. 336, October Term, 1958. "AA." and "GA." designate the appellant's appendix and Government's appendix filed in the court below in the instant proceeding, *i.e.*, petitioner's appeal from the judgment of conviction.

his own returns were correct. (R. 12a, 11b-17b.) Prior to the investigation, the agent had requested (by telephone) an appointment to examine petitioner's records in connection with a review of petitioner's 1950 and 1951 returns. (R. 15b.) The agent did not advise petitioner that he was also interested in obtaining evidence concerning petitioner's possible connection with the suspected misfeasance. (R. 16b-17b.) The appointment was made for the afternoon on which the agent had telephoned and petitioner turned his records over to the agent. (R. 15b, 26b.) The examination disclosed no criminal conduct on petitioner's part with respect to Service personnel; it did, however, disclose petitioner's receipt of a substantial amount of unreported legal fees. (R. 20b-23b.)

On August 17, 1955, Judge Miller denied the motion to suppress and to dismiss, without prejudice, however, to petitioner's right to object at trial to the admission of any evidence obtained from his records. (R. 3a, 9a-14a.) In December, 1955, the motions were reargued before Judge Miller. On May 1, 1956, Judge Miller filed an opinion and order directing the dismissal of the petition for reargument and reconsideration. (R. 4a, 15a-16a.) Petitioner's appeal to the Court of Appeals for the Third Circuit was dismissed for lack of jurisdiction. (R. 4a.)

Thereafter, petitioner filed a second petition for rehearing on the motion to suppress; it was heard before Judge Wallace S. Gourley, to whom the case had been assigned for trial. (R. 5a.) On March 20, 1957, Judge Gourley, after hearing the testimony of several witnesses, granted petitioner's motion to sup-

press. (R. 5a-6a, 17a-26a.) The Government filed a motion for rehearing; it was denied on September 6, 1957, at which time Judge Gourley granted petitioner's previous motion to dismiss the indictment, on the ground that it was based on evidence "procured under circumstances constituting self-incrimination". (Pet. 45.) On appeal, the Third Circuit reversed Judge Gourley's order and remanded the case for trial; it held that there was insufficient warrant for Judge Gourley's granting of the two motions on substantially the same evidence on which Judge Miller had twice denied them. (Pet. 46-54.) This Court denied certiorari. (358 U.S. 873.)

The case then proceeded to trial and petitioner was convicted as charged. (AA. 7a.)[2] At the trial, petitioner testified that the Service agent had first contacted him by telephone in 1953 in connection with an examination of petitioner's 1950 and 1951 returns; that petitioner stated that it "would be fine" for the agent to examine the books and records at petitioner's office (GA. 20b); that he turned over his books and

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[2] The abbreviated record filed in this Court reflects none of the evidence of petitioner's guilt; nor has petitioner challenged the sufficiency of that evidence in this Court or below. The District Court, in denying petitioner's motion for a new trial, stated (Pet. 55):

> On the merits, the evidence was overwhelming, and not denied, that defendant failed to report substantial taxable income for the year 1950. The only defense advanced on the merits was that he did not knowingly and willfully intend to evade the tax. On abundant evidence, the jury found that the defendant willfully filed a false and fraudulent return for that year.

records to the agent as requested; that, after examination of the records for three or four days, the agent requested permission to take them to his own office for further study; that petitioner granted that request, accepting a receipt for the materials taken by the agent (GA. 30b-31b); that in August, 1953, the agent returned with a colleague who identified himself as a "special agent—or intelligence" (GA. 33b), who advised petitioner that "there was a suspicion in their mind of fraud and that they would like to have my records for 1949 and 1952" (GA. 33b); and that petitioner thereupon gave the agents everything they asked for because he "always cooperated most fully with the agents in trying to determine [his] civil liability in this case" (GA. 33b).

At trial, petitioner's counsel was permitted to cross-examine the Government agents as to everything they said to petitioner when they asked for permission to examine his records. (GA. 6b-28b; Pet. 60-61.)

The Court of Appeals affirmed the judgment of conviction. (275 F. 2d 94.)

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 13-19) that his books and records were obtained from him in violation of his privilege against self-incrimination. The fact that the Service agent did not advise petitioner (who, incidentally, was a lawyer) that the investigation might result in criminal prosecution for tax evasion did not taint the evidence obtained from the books and records. *Sclafani* v. *United States*, 265 F. 2d 408, 414-415 (C. A. 2d), certiorari

denied, 360 U. S. 918; *Turner* v. *United States*, 222 F. 2d 926, 929-932 (C. A. 4th), certiorari denied, 350 U. S. 831; *Montgomery* v. *United States*, 203 F. 2d 887, 892-893 (C. A. 5th); *United States* v. *Frank*, 245 F. 2d 284, 286 (C. A. 3d); *Vloutis* v. *United States*, 219 F. 2d 782, 787 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 64-65 (C. A. 8th). Cf. *Powers* v. *United States*, 223 U. S. 303, 313-314; *Wilson* v. *United States*, 162 U. S. 613, 621-624. The fact that petitioner continued to cooperate and to turn over additional records even after he had been warned that "there was a suspicion in their mind of fraud" (GA. 33b) fully justifies the conclusion of the Court of Appeals that petitioner "freely gave his consent to have his records examined with the knowledge that his returns were being investigated" (Pet. 70) and that, in the circumstances, petitioner was not aggrieved if the investigation terminated in "exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud". (Pet. 47.)

2. Nor is there any merit in petitioner's further contention (Pet. 22-30) that the trial court should have reopened the question of the admissibility of the books and records and the evidence derived therefrom. Rule 41(e) of the Federal Rules of Criminal Procedure, *supra*, pp. 4-5, requires that a motion to suppress "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion". *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 143 (C. A. 2d). Questions raised under Rule 41(e) are matters

of law for the court to decide. *Steele* v. *United States*, 267 U. S. 505, 511; *Burris* v. *United States*, 192 F. 2d 253, 254-255 (C. A. 5th). That is particularly clear where there are no conflicts in the evidence. Rule 41(e) obviously does not contemplate a full-dress pre-trial hearing to determine the admissibility of evidence, only to be followed by testimony at trial by the same witnesses as to the same facts. It would be improper to permit a jury to review those facts in order to arrive at its own conclusion concerning the propriety of the judge's pre-trial ruling on the issue of admissibility.

Gouled v. *United States*, 255 U. S. 298 and *Smith* v. *United States*, 348 U. S. 147, relied upon by petitioner, are inapposite. In *Gouled*, important new evidence became available to the defendant for the first time during the trial. In the instant case, it was conceded that there was no such new evidence. (Pet. 58-59; AA. 41a.) In the *Smith* case, there were significant conflicts in the evidence which the trial judge deemed proper for submission to the jury for resolution.

3. The general rule is that judges of co-ordinate jurisdiction sitting in the same court and in the same case may not overrule each other's decisions. *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (C. A. 3d). However, there are circumstances warranting departure from this rule, as petitioner urges and as the court below in its first (1958) opinion in this case recognized when it posed the question for decision as "whether there are sufficient reasons" (Pet. 46) for departing from that rule in the instant case. As this

Court has said, the rule is only a "discretionary rule of practice." Cf. *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199. Flexibility in its application is required to prevent misapplication in particular cases. The decision below—that in the circumstances of this case departure from the rule was not justified—presents no question appropriate for review by this Court. With respect to conflicts within a Court of Appeals itself, this Court has said, "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U. S. 901, 902. We submit that the promulgation of standards governing the circumstances under which district court judges within a particular circuit may overrule each other is equally a function which the Court of Appeals for that circuit should perform.

There is no conflict here with *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (C. A. 2d), as asserted (Pet. 19-21). The court below correctly concluded that the result in *Dictograph Products* was conditioned by the Second Circuit's "conviction that the second judge had been right in dismissing the complaint whereas the first judge had been wrong in not doing so." (Pet. 52.) In the case at bar, whether or not Judge Gourley abused his discretion in rehearing the same matter presented to and previously decided by Judge Miller, he reached the wrong result. As the last opinion of the Court of Appeals points out (Pet. 68-69), the record does not "in any way" support the claim that petitioner was induced to produce evidence through fraud or deceit.

4. Contrary to petitioner's view (Pet. 30-32), the Court of Appeals did not lack jurisdiction when, in 1958, it vacated Judge Gourley's orders dismissing the indictment and suppressing evidence. Those orders were not merely interlocutory. The record clearly shows that on October 18, 1954, petitioner moved to dismiss the indictment, alleging, *inter alia*, that it had been obtained "under circumstances constituting self-incrimination and in violation of defendant's constitutional rights" (*supra*, p. 5). Judge Gourley dismissed the indictment on that ground (R. 34a-36a) and, as the Court of Appeals noted (Pet. 54), the dismissal was entered under Rule 12(b)(2) of the Federal Rules of Criminal Procedure (*supra*, pp. 3-4). This case is therefore readily distinguishable from *United States* v. *Janitz*, 161 F. 2d 19 (C. A. 3d), and *United States* v. *Pack*, 247 F. 2d 168 (C. A. 3d), relied upon by petitioner. (Pet. 30.) In those cases the trial courts had ordered the suppression of vital evidence without which the Government could not obtain convictions, and the indictments were dismissed for lack of prosecution. In the instant case, the Government appealed from the pre-trial dismissal of an indictment thought by Judge Gourley to have been obtained illegally. The court below was plainly right in concluding, in 1958, that appellate jurisdiction was conferred upon it by 18 U.S.C., Section 3731.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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